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SANITARY LEGISLATION.

COURT DECISIONS.

COURT OF APPEALS DISTRICT OF COLUMBIA.

Dirty or Impure Milk Declared to be Adulterated Within the Meaning of the Pure Food Act. (No. 2466, Decided Feb. 25, 1913.)

CHARLES G. DADE, PLAINTIFF IN ERROR, *v.* UNITED STATES OF AMERICA.

STATUTES, CONSTRUCTION OF—PURE FOOD ACT—ADULTERATED MILK.

1. The pure food and drugs act (34 Stat., 770) is a police regulation enacted to conserve the public health, and is to be construed liberally to meet the evils intended to be embraced within its provisions.
2. Food offered for sale in a filthy, decomposed, or putrid condition, caused either from an inherent condition or an external substance, or consisting of or containing filthy, decomposed, or putrid matter, or containing a foreign substance neither filthy, decomposed, nor putrid in itself, but which causes the food from contact with it to decompose or become filthy or putrid, will be held to come within the act.
3. Milk found to be impure will be held to be adulterated within the meaning of the act.

In error to the police court of the District of Columbia to review a judgment convicting the defendant of a violation of the pure food act. Affirmed.

Mr. Henry E. Davis for the plaintiff in error.

Mr. C. R. Wilson, Mr. John Lewis Smith, and Mr. J. A. Cobb for the United States.

Mr. Justice Van Orsdel delivered the opinion of the court:

This case is here in error to the police court of the District of Columbia. Plaintiff in error was convicted of violating the following provision of the pure food and drugs act:

"SEC. 7. That for the purposes of this act an article shall be deemed to be adulterated * * * in the case of food. * * * Sixth. If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." (34 Stat. L., 770.)

The information charged him with unlawfully offering for sale and selling adulterated milk, "in that it did consist in whole and in part of a filthy, decomposed and putrid animal and vegetable substance."

The facts established by the evidence are that "on February 27, 1911, a pint bottle of milk was purchased from one of the defendant's wagons, and taken to the laboratory of the bacteriological bureau of the health department, where it was analyzed, and found to contain 4,500,000 bacteria on ordinary agar, 37° C., grown for 24 hours, and 89,400,000 bacteria per cubic centimeter. On ordinary agar, 25° C., grown 48 hours, it contained 83,000 bacteria per cubic centimeter of the colon group. It showed gas

fermentation in one ten-thousandth of a cubic centimeter, approximately 15 drops, and one streptococcus to one ten-thousandth of a cubic centimeter."

It appears that the bacterium known as *B. coli* or colon bacillus originates in and is a normal constituent of the colon of all warm blooded animals, is discharged in the excreta and found in milk as the result of fecal contamination. When present in milk it always occurs from either direct or indirect fecal deposit therein; directly from carelessness in permitting particles of feces to get into the milk during the process of extracting the milk from the cow, or in handling it afterwards; indirectly, from dust, vegetation, water, and air, where the bacillus is found—originally derived, however, from animal feces. The evidence discloses the state of the science to be that colon bacillus is a vegetable formation originating in animal intestines, and nowhere else. It is not found in air, dust, water, or vegetation under conditions indicating different origin, or its original derivation from the substances with which it is thus associated. Under favorable conditions, colon bacillus will multiply and develop in milk with great rapidity. The present analysis, in the light of the evidence, reveals the presence of colon bacillus to have resulted from a direct deposit of feces in the milk, due to uncleanly methods in handling the milk.

It appears that the streptococcus is associated frequently with the colon bacillus in the colon of warm-blooded animals, and is discharged in the excreta. It is also found in diseased processes of animals—in boils on human beings, or in abscesses in animals, and in diseased tissues and intestines. While milk may be perfectly sterile in the udder of a healthy cow, streptococci may be found in milk taken from a diseased udder. It, however, may be regarded as strongly conclusive that where colon bacilli and streptococci are found together in large numbers, and under the circumstances here shown they originate directly from fecal matter. They are not found in milk as it flows from a healthy animal. Their presence in milk originally pure indicates contamination from an outside source—as to colon bacillus, always fecal contamination; and usually the same as to streptococcus. Streptococcus may also come from a diseased condition of the cow or from persons handling the milk, but its presence was not so accounted for in this case.

It also appears that the growth of bacteria invariably results in the chemical and natural decomposition of the substance in which they grow. Milk is an animal substance, and bacteria are a vegetable formation in the milk. The bacteria develop and die in rapid succession, causing natural decomposition. Colon bacilli and streptococci destroy the sugar in milk, which is broken up into various acids and gases, thus causing chemical decomposition. For example, sour milk is described as decomposed milk, and may be caused by the action of bacteria. The decomposition of milk sugar into lactic acid is a chemical process that causes milk to sour.

This case was not prosecuted upon the assumption that bacteria, as living vegetable organisms, are in themselves either filthy, decomposed, or putrid; but upon the theory, as fully sustained by the evidence, that the bacteria constantly develop and die, causing filthy vegetable decomposition; that the colon bacilli and streptococci found in the milk established the presence of fecal matter; that streptococci especially are a menace to health; that whether the streptococci came into the milk through fecal deposit, or from a diseased condition of the cow or of those handling the milk, the vice is the same; and that these two groups of bacteria especially cause decomposition of the milk.

The pure food and drugs act is a police regulation enacted to conserve the public health. It will be construed liberally to meet the evils intended to be embraced within its provisions. (*United States v. Corbett*, 215 U. S., 233; *District of Columbia v. Gardiner*, 41 Wash. Law Rep., 34, present term; *Galt v. United States*, 41 Wash. Law Rep., 66, present term.) We are not unmindful of the rule that police regulations to be valid must be reasonable, necessary, and not unduly oppressive. The lawmaking power, in their enactment, takes into consideration the public sentiment

of the community as a measure of the degree of regulation to which private property shall be subjected for the public good, and nowhere do the courts so completely reflect the state of public opinion as in deciding cases involving the exercise of the police power. Measures looking to the public welfare are no longer tested by the strict letter of the Constitution. Doubtless many modern expressions of the legislative will, in the exercise of its police power, would have been held unconstitutional if enacted at an earlier period. But public opinion, keeping pace with an advancing civilization, is the progressive factor which calls for an enlarged invasion of private rights for the public good, and which prompts courts to give greater elasticity to constitutional limitations. In flexibility of construction lies the possibility of progress and the vitality of the Constitution. Therefore, some of the technical distinctions sought to be applied by counsel for plaintiff in error in construing the act before us may be disposed of by the suggestion that food offered for sale in a filthy, decomposed, or putrid condition, caused either from an inherent condition or an external substance; or "consisting of" or containing filthy, decomposed, or putrid matter; or containing a foreign substance, neither filthy, decomposed, nor putrid in itself, but which causes the food from contact with it to decompose or become filthy or putrid, will be held to come within the act. It is beyond dispute that the milk, when taken from the wagon of plaintiff in error in the condition in which it was being sold to his customers, was both filthy and decomposed.

It is urged that since it is impossible to produce milk entirely free from bacteria the statute imposes a duty impossible of performance, and can not, therefore, be applied to milk, or, if possible of performance, it could only be complied with at so great a cost as to result in the destruction and confiscation of the business. It is not clear from the evidence that the enforcement of the act will produce this result. The present case does not present this difficulty, except in theory, since the contamination was so great as to place it within the statute beyond the domain of speculation. Not only did the milk in question contain bacteria of the colon group, but, as incident thereto, fecal matter, all of which, it appears, may be eliminated by the adoption of cleanly methods in handling the milk. In fact, it appears that samples from the dairy of plaintiff in error have been analyzed which were free from bacteria of the colon group. One witness testified that he "has encountered milk, samples of raw milk and samples of pasteurized milk, free from bacteria of the colon group; has seen samples of defendant's that did not contain them, milk sold as raw milk and analyzed on that assumption."

We are not dealing with a regulation relating to milk alone, but with an act generally regulating the sale of food products. Milk is a food product; and, if found to be impure, it will be held to be "adulterated" within the provisions of the act. There is evidence that it is impossible to produce raw milk which does not contain bacteria; that a limited number of bacteria in milk are practically harmless, and also that certain kinds of bacteria are in fact harmless. It is unnecessary to decide whether, under such circumstances, milk would be held to come within the act, since in the present case adulteration is clearly established. The dividing line between pure and impure or adulterated food is in each instance a question of fact; but, because of the scientific distinctions involved, and the impossibility of producing raw milk entirely free from bacteria, it may be much more difficult of ascertainment in the case of milk than of other food products. Owing to the great difficulty which may be encountered in justly enforcing the law, in the absence of a fixed standard defining what is marketably pure and impure milk, in a case where the adulteration consists alone in the presence of comparatively small numbers of so-called harmless bacteria, it may well be that Congress should give attention to this subject, as has been done in many of the States, and establish a fixed standard for marketable milk, whereby milk found to contain a greater number of bacteria than that fixed by the act should come within the condemnation of the law. With the fact scientifically demonstrated that con-

taminated milk is a dominating factor in the propagation of tuberculosis, typhoid fever, scarlet fever, diphtheria, infantile diarrhea, and other diseases, the subject, in importance, is one of the first magnitude.

The judgment is affirmed with costs, and it is so ordered.

Affirmed.

Chief Justice Shepard concurs in the judgment.

SUPREME COURT OF THE UNITED STATES.

Milwaukee Ordinance Excluding from City All Milk not from Tuberculin-Tested Herds Declared to be Valid. (No. 274, October Term, 1912, Decided May 12, 1913.)

JOHN QUINCY ADAMS, PLAINTIFF IN ERROR, *v.* THE CITY OF MILWAUKEE AND
GERHARD A. BADING.

In error to the Supreme Court of the State of Wisconsin.

Mr. Justice McKenna delivered the opinion of the court:

Error to review a judgment of the Supreme Court of Wisconsin sustaining the validity of an ordinance of the common council of the city of Milwaukee regulating the sale of milk.¹

The ordinance provides that no milk drawn from cows outside of the city shall be brought into the city, contained in cans, bottles, or packages, unless they be marked with a legible stamp, tag, or impression bearing the name and address of the owner of the cows, and unless such owner shall, within one year from the passage of the ordinance, file in the office of the commissioner of health a certificate of a duly licensed veterinary surgeon or other person given authority by the State live-stock sanitary board to make tuberculin tests, stating that such cows have been found free from tuberculosis or other contagious diseases. The certificate is required to give a number which has been permanently attached to each cow and a description sufficient for identification. The certificate must be renewed annually and must show that the cows are free from tuberculosis or other contagious diseases.

A short time before the ordinance was to go into effect this suit was brought against the city and Dr. Bading, its health commissioner, to restrain the enforcement of the

¹ No person shall bring into the city of Milwaukee for sale, either by wagon, cart, train, or any other kind of vehicle, or keep, have, or offer for sale or sell in said city, any milk or cream drawn from cows outside of said city, contained in cans, bottles, or packages, unless such cans, bottles, or other packages containing such milk or cream for sale, shall be marked with a legible stamp, tag, or impression bearing the name of the owner of such cows from which such milk was drawn, giving his place of business, including the name of city, street, and number, or other proper address, and unless the owner or owners of such cows shall, within one year from the passage of this ordinance, file in the office of commissioner of health a certificate of a duly licensed veterinary surgeon, or of any other person given authority by the State live-stock sanitary board to make tuberculin tests, stating that such cows have been tested with tuberculin and found free from tuberculosis or other contagious diseases. Such certificate shall give a number which has been permanently attached to each cow, and a description sufficiently accurate for identification, stating the date and place of such examination, and such certificate shall be good for one year from date of its issuance. Such certificate, however, must be renewed annually and filed in the office of the commissioner of health, and each such certificate shall show in each case that the animals from which such milk was drawn are free from tuberculosis or other contagious diseases. All milk and cream from sick and diseased cows, or cows fed on refuse or slops from distilleries or vinegar factories, unless such refuse or slops be mixed with other dry sanitary grain or food to a consistency of a thick mush, or other than good wholesome food, or milk that is dangerous or that may affect or be detrimental to life or health, or that has been adulterated, or is below the standard fixed by section 17 of this chapter, or which does not conform to all other provisions of this chapter, shall, upon discovery thereof, be confiscated, forfeited, and immediately destroyed by or under the direction of the commissioner of health, bacteriologist, or officer detailed, who shall, if done in good faith, be held harmless in damage therefor in any suit or demand made. (Ord. No. 159, adopted Mar. 30, 1908.)